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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JASON ROLFE KRATZ, Defendant and Appellant.	B175296 (Los Angeles County Super. Ct. No. SA034873)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie W. Light, Judge. Affirmed with directions.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert T. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Rolfe Kratz was convicted after a jury trial on multiple counts of sexual abuse of minors, providing lewd material to a minor and possession of child pornography. On his initial appeal (*People v. Kratz* (Aug. 4, 2003, B144044) [nonpub. opn.] (*Kratz I*)), we rejected Kratz's claims the trial court had committed prejudicial error in its evidentiary rulings and when instructing the jury, but agreed the court had made two sentencing errors. Accordingly, we vacated the judgment and remanded the case for resentencing.

On remand, in conformity with our directions, the trial court dismissed count one, which charged Kratz with the continuous sexual abuse of one of his three victims, and then sentenced Kratz to a determinate term of 25 years four months, followed by five consecutive 15-years-to-life indeterminate terms under the "One Strike" law (Pen. Code, § 667.61[1]). A sixth 15-year-to-life term was imposed to run concurrently to the other indeterminate terms.[2] In this second appeal Kratz contends the trial court violated *Blakely v. Washington* (2004) 524 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) by imposing the five consecutive indeterminate life terms using factors not submitted to the jury or found to be true beyond a reasonable doubt. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kratz's sexual abuse crimes involved three young victims: his step-daughter Jennifer C.; Mary B., the daughter of a friend of Jennifer's mother; and Denae H., the daughter of a neighbor in Kratz's apartment complex. The jury convicted Kratz of nine counts (counts 1 through 9) in which Jennifer C. was the specifically identified victim, six counts in which Mary B. was the named victim (counts 11 through 16) and five

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[1] Statutory references are to the Penal Code.

[2] The court ordered the 15-year-to-life sentence for count 11 to run consecutively to count 2, but concurrently to count 3, one of the five consecutive indeterminate life terms. The abstract of judgment incorrectly records the sentence on count 11 as consecutive to all of the other indeterminate life terms.

counts in which Denae H. was the named victim (counts 19 through 23).[3] Count 2 of the second amended information, concerning Jennifer, alleged the offense occurred "[o]n or about January 15, 1999." Counts 3 through 7, also relating to Jennifer, each alleged that the offense charged occurred "[o]n and between April 18, 1997 and January 14, 1999."[4] Counts 8 and 9 each alleged the offense occurred "[o]n and between September 1, 1997 and April 30, 1998." Each of the six counts concerning Mary B. alleged that the offenses occurred "[o]n and between September 1, 1997 and April 30, 1998." The five counts involving Denae H. alleged the offenses all occurred "[o]n and between January 1, 1995 and July 31, 1995." As to the 20 counts in the second amended information that specified a time period, rather than a specific date, the jury was instructed the People needed "to prove beyond a reasonable doubt the commission of a specific act constituting the crime charged in that count within the period alleged. [¶] And, in order to find the defendant guilty of any of the twenty counts just listed, you must unanimously agree upon the commission of the same specific act constituting the crime charged in that count within the period alleged."

In addition to convicting Kratz on each of these substantive counts, with respect to the 17 counts charging a violation of section 288, subdivision (a), the jury found true the special allegation that Kratz has been convicted in this case of committing lewd acts upon a child against more than one victim. Accordingly, as to these counts Kratz was potentially eligible for sentencing to an indeterminate term of 15 years to life under the One Strike law (§ 667.61, subds. (b), (c)(7), (e)(5)[5]). Pursuant to section 667.61,

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[3] No specific victim is identified in the second amended information for the two counts of exhibiting harmful matter (counts 10 and 17) and the count for possession or control of child pornography (count 18) for which Kratz was convicted.

[4] Count 1, which was dismissed following our remand for resentencing, charged Kratz had engaged in continuous sexual abuse of Jennifer C. from April 18, 1997 to January 14, 1999 in violation of section 288.5, subdivision (a).

[5] Section 667.61, subdivision (b), provides, "[A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in

subdivision (g), the indeterminate One Strike term may only be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion; if there are multiple victims during a single occasion, the One Strike sentence must be imposed on the defendant "once for each separate victim."[6]

The trial court initially sentenced Kratz to a determinate sentence of 25 years four months, to be followed by six consecutive indeterminate sentences of 15 years to life under section 667.61, subdivision (b), for counts 2, 3, 11, 19, 20 and 21. In his initial appeal Kratz argued that, because the multiple-victim factor had been used to impose the One Strike sentence, it could not also be considered a factor in aggravation to impose consecutive life sentences. (Cal. Rules of Court, rule 4.425(b)(ii).) Kratz then argued the court erred by imposing six consecutive life sentences because the jury was not asked to determine if the offenses had occurred on different occasions, which he asserted was required by *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*). Kratz asserted the jury verdicts necessarily supported imposition of only three consecutive life sentences: count 2 against Jennifer C. (January 15, 1999); count 11 against Mary B. in the period September 1, 1997 through August 30, 1998; and

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subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years . . . ." Subdivision (c)(7) identifies a violation of section 288, subdivision (a), as a qualifying offense with an exception not applicable in this case. Finally, subdivision (e)(5) specifies as one of the triggering circumstances for imposition of a One Strike sentence, "The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

[6] Section 667.61, subdivision (g), provides, "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable."

one of the three counts against Denae H. in the period January 1, 1995 through July 31, 1995.

In *Kratz I* we rejected Kratz's *Apprendi* argument and held the trial court had properly determined that the three counts involving Denae H. had occurred on separate occasions: "When the court imposed the consecutive life sentences, it found that as to Denae count nineteen was the grocery store incident, county twenty was the video store incident and count twenty[-]one was the bedroom incident." (*Kratz I*, *supra*, B144044at p. 33.) We agreed with Kratz, however, that imposing separate consecutive life sentences for both count 3, lewd conduct against Jennifer C. between April 18, 1997 and January 14, 1999, and count 11, lewd conduct against Mary B. between September 1, 1997 and August 30, 1998, was impermissible in light of Mary B.'s testimony that Jennifer was always present when Kratz molested her, which meant it was not possible to determine if those counts had occurred on separate occasions. (*Kratz I*, at pp. 33-34.) We concluded "the evidence supports the imposition of five, rather than six consecutive life sentences." (*Kratz I*, at p. 34.)

Kratz also argued it was error for the trial court to enter convictions on count 1, continuous sexual abuse of Jennifer C. between April 18, 1997 and January 14, 1999 in violation of section 288.5, subdivision (a), and counts 3 through 8, which charged specific acts of sexual abuse during that same period, even though the sentence on count 1 had been stayed. The People agreed under *People v. Johnson* (2002) 28 Cal.4th 240, 248, that count 1 and counts 3 through 8 should have been charged in the alternative. Accordingly, we remanded for resentencing to permit the trial court to "determine whether appellant should stand convicted of continuous sexual abuse (count one) or the separate offenses (counts three through eight)," and to impose the proper number of consecutive life terms under the One Strike law. (*Kratz I*, *supra*, B144044 at pp. 32, 35-36.)

On remand the People requested the trial court dismiss count 1, continuous sexual abuse, and otherwise impose the original sentence "consistent with the decision of the

appellate court." At the resentencing hearing the court granted the request to dismiss count 1 and sentenced Kratz to five consecutive indeterminate life terms on counts 2, 3, 19, 20, and 21. On count 11 the court imposed a term of "15 to life under 667.61(b), concurrent with count 3 but consecutive to count 2."

DISCUSSION

In *Blakely, supra,* 524 U.S. ___ [124 S.Ct. 2531], decided after both our remand and the resentencing hearing, the United States Supreme Court reaffirmed its holding in *Apprendi, supra,* 530 U.S. 466 that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely,* at p. ___ [124 S.Ct. at p. 2536].) Relying on *Blakely*, Kratz once again argues the trial court erred by sentencing him to multiple consecutive indeterminate life terms using a factor (that the sexual abuse of Jennifer C., Mary B. and Denae H. had occurred on five separate occasions) not submitted to the jury or found to be true beyond a reasonable doubt.

Assuming Kratz is correct as to the applicability of *Blakely* to imposition of consecutive sentences under California law (*People v. Juarez*, review granted Jan. 19, 2005, S130032) and that *Blakely* error is properly raised on appeal notwithstanding the lack of objection in the trial court,[7] any error in sentencing Kratz was harmless. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

First, even if *Blakely* requires a jury determination of the predicate facts used by the court to impose consecutive sentences under section 667.61, its requirement of jury findings has been satisfied in this case as to three of the five consecutive life terms

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[7] The issue of *Blakely*'s application to California's criminal sentencing scheme, specifically including its applicability to the imposition of consecutive sentences, is currently before the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

imposed by the trial court: The jury by its verdicts necessarily found beyond a reasonable doubt the sexual abuse of Jennifer C. identified in count 2 (alleged to have occurred on January 15, 1999), the sexual abuse of Mary B. identified in count 11 (alleged to have occurred between September 1, 1997 and August 30, 1998) and the sexual abuse of Denae H. (alleged in counts 19, 20 and 21 to have occurred between January 1, 1995 and July 31, 1995) had occurred on three different dates. These jury findings support imposition of consecutive terms under section 667.61, subdivision (g).

Second, again assuming *Blakely* applies, the trial court's independent determination that the sexual abuse of Denae H. alleged in counts 19, 20 and 21 occurred on separate occasions is nonetheless harmless error if the evidence was so strong that we conclude the jury would have found, beyond a reasonable doubt, the existence of the requisite predicate facts for imposition of consecutive life terms as to these three counts. (See *People v. Sengpadychith, supra,* 26 Cal.4th at p. 327.) In this case the evidence presented during the jury trial and considered by the trial court in determining the appropriate sentence to impose was overwhelming that Kratz had committed lewd or lascivious acts upon Denae H. on at least four separate occasions, including what the trial court identified as the grocery store incident, the video store incident and the bedroom incident.

As we explained in *Kratz I*, the evidence at trial established that in 1995, when Denae H. was nine years old, she and her mother were neighbors of Kratz and his family. Over a period of several months Denae H. visited the Kratz apartment nearly every day; Kratz was often the only adult present. Denae H., who was 13 years old at the time of trial, testified that Kratz touched her on several different occasions. In one incident, on the way back from a grocery store or drug store, Kratz pulled the car over, put his hand inside Denae H.'s pants and touched her vagina with his finger. On another occasion, when Kratz and Denae H. went to a video store, Kratz parked the car and asked her whether she wanted to touch his penis. Kratz then put Denae H.'s hand directly on his penis and made her rub it. Later that evening Denae H. was sleeping on the floor in the

children's bedroom of Kratz's apartment when Kratz came in naked and woke Denae H. Kratz said he wanted to touch her, shined a flashlight on her vagina and caressed her. When Denae H. told Kratz to stop, he became angry and walked away. Several days after the incident involving the video store, Kratz took Denae H. to his apartment's swimming pool where he touched her leg and then attempted to touch her vagina after backing her into a corner of the pool.

In light of this evidence and bearing in mind that the jury found Kratz guilty beyond a reasonable doubt of committing four acts and one attempted act of lewd conduct upon Denae H., we have no doubt that, had the jury been asked whether three of those crimes (the grocery store incident, the video store incident and the children's bedroom incident) occurred on separate occasions, it would have reached the same conclusion as did the trial court.

DISPOSITION

The judgment is affirmed. The abstract of judgment is ordered corrected to reflect that the sentence on count 11 is to run concurrently to the sentence imposed on count 3. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.